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TAKAKO SAKAO

v.

NG PEK YUEN & ANOR (NO 2)

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ZULKEFLI MAKINUDIN FCJ
GOPAL SRI RAM FCJ
[CIVIL APPEAL NO: 02(f)-20-2009(W)]

C

16 NOVEMBER 2009

CIVIL PROCEDURE: *Costs - Indemnity basis - Whether court's discretion to award costs on an indemnity basis unfettered*

D

CIVIL PROCEDURE: *Judgments and orders - Consequential orders - Power of court to give effect to its judgment or order*

CIVIL PROCEDURE: *Specific relief - Mandatory injunction - Whether Federal Court empowered to fashion specific relief such as mandatory injunction to meet justice of the case*

E

EQUITY: *Equitable remedies and reliefs - Constructive trust - Property subject to trust sold to third party and purchase price paid to trustee - Impossible to regain property in specie - Whether beneficiary bereft of remedy - Whether trustee ought to be ordered to pay half the purchase price to beneficiary*

F

EQUITY: *Equitable remedies and reliefs - Injunction - Whether Federal Court empowered to fashion specific relief such as mandatory injunction to meet justice of the case*

G

LAND LAW: *Restraint on dealings - Registrar's caveat - Entry of - Whether Federal Court empowered to direct Registrar to enter caveat - National Land Code, ss. 320, 321 & 417*

TRUSTS: *Constructive trust - Property - Property on trust realised by trustee - Whether beneficiary bereft of remedy - Whether trustee ought to be ordered to pay half the purchase price obtained to beneficiary*

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I

On 16 October 2009, the Federal Court allowed the appellant's appeal. The Court reversed the judgments of the High Court and Court of Appeal, and held that the appellant was the beneficiary under a constructive trust in respect of a certain property ('the property') acquired by the second respondent as trustee. However, the second respondent had sold the property to a third party and the instrument of transfer had been presented for registration. On 27 October 2009, in order to prevent any further fraud and for the purpose of preserving the property, the Federal Court directed the Registrar of Titles to enter his caveat pursuant to s. 320 read with s. 321 of the National Land Code ('Code'). Despite the Court's express directions, the Court was advised that the Registrar had registered the transfer in favour of the third party and had released the issue document of title to the third party. Further, the purchase price amounting to RM3.8m had been wholly released to the second respondent. The issues before the Federal Court in this instance were: (i) whether the court could make an order in the form of specific relief to give effect to its principal judgment of 16 October 2009; and (ii) whether having regard to all the circumstances of the case, the appellant should be awarded costs on an indemnity basis.

Held

Per Gopal Sri Ram FCJ:

(1) The Federal Court had directed the Registrar to enter his caveat in the exercise of the powers conferred by s. 417 of the Code. The court had ample jurisdiction to make consequential orders to give effect to its judgment, including directing the entry of a registrar's caveat and to ensure that its judgment in particular cases is not defeated by intervening events. *Tan Soo Bing v. Tan Kooi Fook* (refd); *Seet Soh Ngoh v. Venkateswara Sdn Bhd* (refd); *Sungei Biak Tin Mines Ltd v. Saw Choo Theng (No 2)* (foll). (paras 1 & 2)

(2) In the instant case, although the just and equitable remedy would have been to sell the subject property and to have the net proceeds divided equally between the parties, subsequent events made this impossible. Thus, the effective remedy was to direct the second respondent to pay to the appellant's solicitors the sum of RM1.9m representing one-half of the purchase price. The payment ought to be effected not later than 4pm on 30 November 2009. *Yeoman's Row Management Ltd & Anor v. Cobbe* (foll). (paras 4, 5 & 6)

(3) The order made by the Federal Court was in the nature of a mandatory injunction, the breach of which would attract penal consequences upon the heads of the second respondent's directors. The Federal Court had ample jurisdiction to fashion specific relief, in this instance the remedy of injunction, to meet the justice of this case based on its peculiar facts. *Co-operative Insurance Society Ltd v. Argyll Stores* (foll). (para 6)

(4) The discretion to award costs on an indemnity basis is unfettered. All that is required is that it must be an appropriate case warranting an award on that basis. In the instant case, the second respondent had conducted its case in bad faith. Its *alter ego* – the first respondent's common law husband – and the first respondent had set themselves upon a course to unlawfully deprive the appellant of her legitimate interest in the subject property. Having regard to his conduct – which was to be equated as the conduct of the second respondent company – this was an appropriate case to award costs on an indemnity basis at all levels. *Macmillan Inc. v. Bishopgate Investment Trust Ltd*, 10 December 1993, (unreported) (refd); *Moore Stephens v. Stone Rolls Limited (in liquidation)* (refd). (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Pada 16 Oktober 2009, Mahkamah Persekutuan membenarkan rayuan perayu. Mahkamah itu membatalkan penghakiman-penghakiman Mahkamah Tinggi dan Mahkamah Rayuan, dan memutuskan bahawa perayu adalah benefisiari di bawah satu amanah konstruktif berhubung dengan hartanah tertentu ('hartanah itu') yang diperolehi oleh responden kedua sebagai pemegang amanah. Walau bagaimanapun, responden kedua telah menjual hartanah itu kepada pihak ketiga dan suratcara pemindahan telah dikemukakan untuk pendaftaran. Pada 27 Oktober 2009, untuk menghalang apa-apa fraud lanjutan dan dengan tujuan mengekalkan hartanah itu, Mahkamah Persekutuan mengarahkan Pendaftar Hakmilik memasukkan kaveatnya melalui s. 320 dibaca bersama-sama dengan s. 321 Kanun Tanah Negara ('Kanun'). Meskipun arahan-arahan nyata Mahkamah, Mahkamah telah dinasihati bahawa Pendaftar telah mendaftarkan pemindahan bagi pihak ketiga dan telah melepaskan dokumen hakmilik keluaran kepada pihak ketiga. Tambahan lagi, harga belian berjumlah

sebanyak RM3.8 juta telah dilepaskan sepenuhnya kepada responden kedua. Isu-isu di hadapan Mahkamah Persekutuan di sini ialah: (i) sama ada Mahkamah boleh membuat suatu arahan dalam bentuk relief spesifik untuk memberi efek kepada penghakiman utamanya pada 16 Oktober 2009; dan (ii) sama ada memandangkan kesemua halkeadaan kes, perayu sepatutnya diberi kos atas dasar tanggung rugi.

Diputuskan
Oleh Gopal Sri Ram HMP:

(1) Mahkamah Persekutuan telah mengarahkan Pendaftar untuk memasuki kaveatnya mengikut pelaksanaan kuasa-kuasa yang diberi oleh s. 417 Kanun. Mahkamah mempunyai bidangkuasa yang mencukupi untuk membuat perintah-perintah berbangkit untuk memberi efek kepada penghakimannya, termasuk mengarahkan pemasukan kaveat pendaftar dan untuk memastikan bahawa penghakimannya dalam kes-kes tertentu tidak ditewaskan oleh kejadian-kejadian mencelah. *Tan Soo Bing v. Tan Kooi Fook* (dirujuk); *Seet Soh Ngoh v. Venkateswara Sdn Bhd* (dirujuk); *Sungei Biak Tin Mines Ltd v. Saw Choo Theng (No 2)* (diikuti).

(2) Dalam kes semasa, walaupun remedi yang adil dan berekuiti sebenarnya ialah untuk menjual hartanah itu dan untuk membahagikan hasil bersih dengan sama rata di antara pihak-pihak, kejadian-kejadian selepas itu telah menjadikannya mustahil. Oleh itu, remedi efektif ialah untuk mengarahkan responden kedua untuk membayar peguamcara perayu jumlah sebanyak RM1.9 juta yang mewakili setengah harga belian. Pembayaran itu seharusnya dilaksanakan tidak lewat daripada 4pm pada 30 November 2009. *Yeoman's Row Management Ltd & Anor v. Cobbe* (diikuti).

(3) Perintah yang dibuat oleh Mahkamah Persekutuan adalah bersifat sesuatu injunksi mandatori, di mana pelanggarannya akan membawa kepada akibat-akibat penal atas kepala-kepala pengarah-pengarah responden kedua. Mahkamah Persekutuan mempunyai bidangkuasa yang mencukupi untuk membuat relief spesifik, di sini remedi injunksi, untuk memenuhi keadilan kes ini berdasarkan fakta-fakta tersendirinya. *Co-operative Insurance Society Ltd v. Argyll Stores* (diikuti).

A **(4)** Budibicara untuk mengaward kos atas dasar tanggung rugi tidak mempunyai had. Apa yang hanya diperlukan ialah bahawa ia mesti merupakan suatu kes yang patut menerima suatu award atas dasar itu. Dalam kes semasa, responden kedua telah menjalankan kesnya dengan niat jahat. *Alter ego*nya –
B suami common law responden pertama – dan responden pertama telah menetapkan diri mereka mengikut jalan untuk melucutkan secara menyalahi undang-undang kepentingan sah perayu dalam hartanah itu. Memandangkan kelakuannya – yang akan disamakan seperti kelakuan responden kedua – ini
C merupakan kes yang berpatutan untuk mengaward kos atas dasar tanggung rugi pada semua tahap. *Macmillan Inc. v. Bishopgate Investment Trust Ltd*, 10 December 1993, (unreported) (dirujuk); *Moore Stephens v. Stone Rolls Limited (in liquidation)* (dirujuk).

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Case(s) referred to:

Co-operative Insurance Society Ltd v. Argyll Stores [1997] UKHL 17 ***(foll)***

Macmillan Inc. v. Bishopgate Investment Trust Ltd, 10 December 1993, (unreported) ***(refd)***

Moore Stephens v. Stone Rolls Limited (in liquidation) [2009] UKHL 39
E ***(refd)***

Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor [1975] 1 LNS 159 ***(refd)***

Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2) [1970] 1 LNS 150 FC ***(foll)***

Tan Soo Bing & Ors v. Tan Kooi Fook [1997] 1 CLJ 556 FC ***(refd)***

F *Yeoman's Row Management Ltd & Anor v. Cobbe [2008] UKHL 55* ***(foll)***

Legislation referred to:

National Land Code, ss. 320, 321, 417

For the appellant - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners

G *For the 2nd respondent - S Parameswary (K Gheethabai & D Mahalingam with him); M/s Tay, Tee & Nasir*

[Appeal from Court of Appeal, Civil Appeal No: W-02-1236-2005]

Reported by Andrew Christopher Simon

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JUDGMENT

Gopal Sri Ram FCJ:

I

[1] This court by its judgment dated 16 October 2009 found for the appellant on the basis that she is the beneficiary under a constructive trust of which the second respondent is trustee. The

subject matter of the trust is the property referred to in that judgment. Argument was sought from counsel as to the nature of the specific relief that should be granted having regard to the facts of this case and also as to the type of costs order that should be made. Evidence was filed by both sides as to the present state of affairs. It emerged, undisputed, that the second respondent had sold the subject property to a third party and that the instrument of transfer had been presented for registration. To prevent any further fraud and for the purpose of preserving the subject property *in specie*, on 27 October 2009 we directed the Registrar of Titles to enter his caveat pursuant to s. 320 read with 321 of the National Land Code 1965. We did so in the exercise of the powers conferred by s. 417 of the National Land Code. It is settled that this court has ample jurisdiction to make consequential orders to give effect to its judgment (see, *Tan Soo Bing & Ors v. Tan Kooi Fook* [1997] 1 CLJ 556) including directing the entry of a registrar's caveat (see, *Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor* [1975] 1 LNS 159) and to ensure that its judgment in particular cases is not defeated by intervening events.

[2] An illustration is provided by *Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2)* [1970] 1 LNS 150. There, the former Federal Court gave judgment for the defendant/appellant holding that it had not been guilty of a breach of a mining sub-lease. However, before the appeal was heard by the Federal Court, the respondents had sub-leased the land to a third party. After judgment, the appellant moved for an order that the Collector of Land Revenue should delete the cancellation of the sub-lease. The application was opposed by the respondents and by the third party. The court allowed the application, ordered the deletion of the sub-lease in favour of the third party and directed the re-registration of the appellant. Suffian FJ who delivered the judgment of the court said:

> Our judgment says that the defendant company was not guilty of breach of condition and that therefore its sublease should not have been cancelled. If it had not been cancelled, then the company would still have been the sublessee, and it alone had power to dispose of any interest in the land; the plaintiffs could not have done so and if they have done so to the detriment of the company's right, the court is not powerless to get Mr. Lee Yat Kai off the register. Section 417 of the National Land Code clearly says that the court has power to direct the collector to do

A all such things as may be necessary **to give effect to its judgment or order.** If we did not order the collector to remove Mr. Lee's name from the register and put back on it that of the defendant company, we would be allowing the plaintiffs and Mr. Lee to thumb their noses at a judgment of the Federal Court, and I do not think that we should allow that. We should give effect to our judgment and order the collector to get Mr. Lee off the register and put the defendant company back on it. (emphasis that of Suffian FJ)

[3] When we convened on 13 November 2009 to hear further argument and to be advised on the current position, we were surprised to learn that despite our express direction to him to enter his caveat to prohibit further dealings, the registrar had registered the transfer in favour of the purchaser and had released the issue document of title to him. We were also advised that the whole of the purchase price amounting to RM3.8 million had been released to the second respondent. Its counsel suggested that there was nothing much we could do except to enter a monetary judgment in the appellant's favour which may well end up not being worth the paper on which it was printed. With respect, we are unable to agree.

[4] So far as relief is concerned in a case as the present, we derive much assistance from the speech of Lord Scott of Foscote in *Yeoman's Row Management Ltd & Anor v. Cobbe* [2008] UKHL 55 where he said:

> It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed

and cannot agree about what is to be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.

[5] In the present case, the appellant and the first respondent as partners, that is to say, as joint venturers, agreed to embark on a joint venture which involved the acquisition of the subject property for the purposes of the partnership, that is to say, the joint venture, and the first respondent with the agreement of the appellant, her co-joint venturer, who believed her to be acting for their joint purposes, acquired the property in her name but subsequently sought to retain the land for her own benefit. Hence, this court regarded her as a constructive trustee. And in the circumstances of the present case, the just and equitable remedy would have been to sell the subject property and to have the net proceeds divided equally between the parties. However, subsequent events have made this impossible as the second respondent who though bound by the constructive trust has unilaterally sold off the subject property and pocketed the purchase price. The property has gone into the hands of a person who is not alleged to have acquired it with notice of the trust in the appellant's favour. So it cannot now be regained in specie and *restitutio in integrum* decreed. Does this mean that the appellant is bereft of any remedy? We do not think so. We do not think that the second respondent should be allowed to thumb its nose at our judgment.

[6] In our considered opinion, the effective remedy is to direct the second respondent to pay to the appellant's solicitors (since she is a foreigner and not in Malaysia) the sum of RM1.9 million representing one-half of the purchase price. The payment is to be effected not later than 4pm on 30 November 2009. The order we make is in the nature of a mandatory injunction the breach of which will attract penal consequences upon the heads of the second defendant's directors, including, of course, the first respondent's common law husband. We have ample jurisdiction to fashion specific relief, in this instance the remedy of injunction, to meet the justice of this case based on its peculiar facts. As Lord Hoffmann said in *Co-operative Insurance Society Ltd v. Argyll Stores* [1997] UKHL 17; [1998] AC 1; [1997] All ER 297; [1997] 2 WLR 898, no doubt in the context of another type of specific relief:

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> A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well established principles which govern the exercise of the discretion but these, **like all equitable principles, are flexible and adaptable to achieve the ends of equity,** which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law. (*Wilson v. Northampton and Banbury Junction Railway Co.* [1874] LR 9 Ch. App. 279, 284). Much therefore depends upon the facts of the particular case ...

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[7] That brings us to the matter of costs. Learned counsel for the second respondent submitted that the appellant should be awarded costs on a party and party basis. For the appellant it was submitted that she should be awarded indemnity costs having regard to all the circumstances of the case.

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[8] Some of the guidelines for an award of indemnity costs were discussed by Millett J (later Lord Millett) in *Macmillan Inc. v. Bishopgate Investment Trust Ltd*, 10 December 1993, (unreported):

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> The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion as to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fettered or circumscribed beyond the requirement that taxation on an indemnity basis must be 'appropriate'.

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[9] What appears clear is that the discretion to award costs on an indemnity basis is unfettered. All that is required is that it must be an appropriate case warranting an award on that basis. There is no doubt that in this case the second respondent conducted its case in bad faith. Its directing mind and will – indeed its *alter ego* – was the first respondent's common law husband. In essence he was the company. Both he and the first respondent set themselves upon a course to unlawfully deprive the appellant of her legitimate interest in the subject property. Having regard to his conduct –

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which is to be equated as the conduct of the second respondent company (see, *Moore Stephens v. Stone Rolls Limited (in liquidation)* [2009] UKHL 39, per Lord Phillips of Worth Matravers at para 51) – we consider this to be an appropriate case to award costs on an indemnity basis at all levels. We so ordered. The deposit in court was ordered to be refunded to the appellant.